Supreme Court, U.S.
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No. 97-1067

In The

Supreme Court of the United States

October Term, 1997

COLEMAN OIL COMPANY, INC.,

Petitioner,

vs.

THE CIRCLE K CORPORATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether the Bankruptcy Code, and, in particular, the 11 U.S.C. § 365 right to cure defaults in connection with assumption of leases within the time permitted by § 365(d)(4) (extended by the bankruptcy court pursuant to § 365(d)(4) without objection by the landlord) precludes that landlord from relying on alleged prepetition defaults to avoid a postpetition, pre-confirmation, pre-assumption extension of the terms of the leases by reason of lease provisions providing for such extension of the terms upon timely notice of extension, if the lessee is not in default.

> And, but only in the event of the Court's granting the Petition and eventual disagreement with the rationale of the courts below:

Whether the summary judgment assuming the leases should be affirmed as to all or some of the six leases by reason of Petitioner's failure to show a genuine issue of fact as to its non-satisfaction of notice of default requirements, by reason of anti-forfeiture principles, or otherwise.

LIST OF PARTIES

The Petition lists the parties named in the adversary proceeding and motions to assume leases which led to the summary judgment affirmed by the Ninth Circuit.

Of the named Respondents, Old Colony Petroleum Company, Inc. ("OCP") and New England Petroleum Distributors, Inc. ("NEPD") (the lessees under the leases in question during relevant periods) were wholly owned subsidiaries of NPI Corporation ("NPI") which became a wholly owned subsidiary of The Circle K Corporation in 1988.

The Circle K Corporation and affiliates filed Chapter 11 Bankruptcy proceedings in 1990. Pursuant to the confirmed plan of reorganization, OCP was merged into Circle K Convenience Stores, Inc. The Circle K Corporation which is named in the adversary proceeding also merged into Circle K Convenience Stores, Inc., which changed its name to The Circle K Corporation. In 1995, that Circle K Corporation, a Texas corporation, changed its name to Circle K Stores, Inc. and its parent, Circle K Holdings, Inc., a Delaware corporation, changed its name to The Circle K Corporation.

The Circle K Corporation, a Delaware corporation, is now a wholly owned subsidiary of Tosco Corporation, a Nevada corporation, which is publicly held.

The Respondents have no subsidiaries other than those which are wholly owned.

Interested parties also include:

Gibbs Oil Company Limited Partnership (assignee of the lessee's interests previously held by OCP, with certain

indemnification rights (with respect to the underlying litigation) against The Circle K Corporation, the Texas corporation n/k/a Circle K Stores, Inc., and Circle K Properties, Inc., which has now been merged into Circle K Stores, Inc.)

New England Petroleum Limited Partnership (assignee of the lessee's interests previously held by NEPD, with certain indemnification rights against The Circle K Corporation (the Texas corporation n/k/a Circle K Stores, Inc.), NEPD, and Charter Marketing Company(Connecticut) with respect to the underlying litigation)

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OPINIONS OF THE COURTS BELOW

The transcript of the bankruptcy court's oral ruling granting the summary judgment is omitted from Petitioner's Appendix (hereafter, "P.A."), but included in the Appendix hereto (hereafter, "A.").

P.A. omits the exhibits (legal descriptions of the leased properties) to the Order of the bankruptcy court.

STATEMENT OF THE CASE

Petitioner Coleman Oil Company, a New Hampshire corporation, ("Coleman") leased various retail gasoline stores, primarily in New Hampshire, to one of Respondents' predecessors in interest. Old Colony Petroleum Company, Inc. ("OCP") became the holder of the lessee's interest in two of the leases. New England Petroleum Distributors, Inc. ("NEPD") became the holder of the lessee's interest in four. Coleman does not seek review of the determinations of the courts below that OCP (and subsequently its successor The Circle K Corporation, n/k/a Circle K Stores, Inc.) and NEPD, in fact, held the lessee's rights under those six leases. Petition (hereafter, "P.") i and 17; P.A. 4a-5a, 14a-17a, 51a-53a.

Each lease includes the right to extend the term for two additional five year periods, provided that the particular lease was not in default and that the other leases were not in payment default. Lease ¶ 3. Each lease provides for cure periods after lessee's receipt of notice of default from the lessor. Lease ¶ 15. Each lease also includes an option to purchase, provided that the particular lease was not in default and that the other leases were not in payment default. Lease ¶ 19. A copy of the cited provisions from one of the leases is at A. 24a-29a. The parties agree that each of the leases is substantially identical except for the property description, the rent amount and the purchase option price. *See* Appellant's Opening Br. (to Ninth Circuit) at 4.

On May 15, 1990, The Circle K Corporation and affiliated subsidiaries including OCP and NEPD filed Chapter 11 bankruptcy petitions. The affiliated debtors-in-possession ("Debtors") had over 4,500 leases to evaluate for assumption or rejection for the benefit of their jointly administered estates. *See* Appellee's Excerpt of Record (to Ninth Circuit) 10, 11, and 12. The bankruptcy court granted Debtors' requests pursuant to 11 U.S.C. § 365(d)(4) for extensions of time in which to assume or reject. Coleman did not at any time object to the extensions of time and did not seek at any time to require an earlier decision on assumption or rejection of the leases from Coleman.

Coleman sought by adversary complaint a determination that the leases had terminated prepetition. Coleman does not seek review of the determinations of the courts below that the leases had not terminated prepetition. P. i and 17. In 1992, the Debtors gave timely notice of the extension of the terms of the leases for an additional five years.

With respect to defaults claimed to have been in existence in 1992, Coleman first provided specific notice to the relevant Debtors of its payment default claims in the form of the Supplemental Affidavit of Frederick Pettigrew dated September 14, 1993, ("Supplemental Affidavit"), long after the Debtors' exercised their rights to extend. *See* Ex. 5 to Excerpts of Record to Opening Brief of Appellant (to Ninth Circuit) and Ex. S thereto.[1] The noticed payment defaults were limited to taxes for

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1. Otherwise, with respect to notice, Coleman relied in opposition to the summary judgment motion (Bankruptcy Court Adv. Pro. Docket No. 61, at 14, n.7) only on three unauthenticated letters. *See* Ex. 5 to Excerpts of Record to Opening Brief of Appellant (to Ninth Circuit) and Exs. F, G and J thereto. The first (April 4, 1989, addressed only to NEPD) gives no notice of any of the defaults now

(Cont'd)

prepetition periods on the two OCP stores, prepetition unsecured claims of persons who performed maintenance and environmental work on the same two stores and one of NEPD's, and an alleged postpetition default of approximately $200 (held *de minimis* by the courts below, and promptly paid upon receipt of notice by OCP) at an OCP location, which postpetition default had previously been noticed only to NEPD. *See* Bankruptcy Court Adv. Pro. Docket No. 45.

In March and April 1993, the Debtors filed motions to assume the leases. Those motions were consolidated with the adversary proceeding in which the bankruptcy court granted the Debtors' motions to assume the leases. P.A. 5a. In its ruling from the bench, the bankruptcy court made numerous determinations and set forth the bases for its grant of summary judgment. A. 13a-23a.

Coleman appealed to the Bankruptcy Appellate Panel for the Ninth Circuit Court of Appeals ("BAP") which affirmed in December 1995, P.A. 9a-28a, amended January 1996. P.A. 39a-42a. In dealing with the 1992 renewal, the BAP focused on the interpretation and application of § 365. The BAP stated that there were some pre- and postpetition defaults, P.A. 18a, n.3, but did not deal with: (1) the absence of any showing of specific notice of defaults sufficient to permit Coleman to rely upon any such defaults to preclude extension of the terms of the leases;

(Cont'd)
claimed to have prevented extension of the terms of the leases in 1992. The second (September 20, 1989, addressed only to Jacob Segal with no evidence of his connection to any Debtor) gives only vague notice of a non-monetary maintenance default at the Kittery, Maine location. The third (March 9, 1992, addressed only to NEPD) gives only vague notice of property tax defaults which are claimed only at Durham and Portsmouth (as to which OCP and not NEPD was the lessee).

(2) the relation back of cure of defaults under assumed leases to the petition date (that is, to a date prior to the 1992 extension of the terms of the leases); (3) anti-forfeiture provisions of state law which would preclude Coleman's attempt to reject extension of the lease terms even if bankruptcy law did not prevent it, *see* P.A. 18a, n.4, 41a-42a; or (4) the unenforceability of cross-default provisions in bankruptcy to prevent assumption of leases, which would preclude reversal of the summary judgment as to some stores even if the majority were incorrect as to § 365 and even if there were a genuine issue of fact as to the adequacy of notice of defaults or the application of anti-forfeiture provisions of state law as to those leases as to which defaults were claimed. Under the BAP's view of § 365, applicable to all the leases, it was unnecessary to deal with this multitude of issues.

The Ninth Circuit Court of Appeals affirmed on the same grounds, P.A. 43a-58a, also without dealing with the alternative grounds for summary judgment. It also affirmed for reasons that would make those other issues immaterial. P.A. 54a.

After entry of the summary judgment, Debtors sold the lessee's interests in the leases to parties now known as Gibbs Oil Company Limited Partnership ("Gibbs") and New England Petroleum Limited Partnership ("NEPLP"), with certain indemnification obligations to them with respect to the litigation with Coleman. Stipulated Order entered September 17, 1997, A. 32a-33a. In 1996, Gibbs and NEPLP gave notice of exercise of the purchase options in each of the leases. A. 35a-36a.

The extended term of the leases would ordinarily have expired at the end of November 1997. A. 36a. The transfer pursuant to exercise of the purchase options would ordinarily have taken place at or before the end of November 1997. The parties entered into a stipulated order preserving the lessees' right to retain possession, the obligation to pay rents (without

prejudice to the argument for their application to the purchase prices), and the right to re-exercise the purchase options after that time, if necessary (all without prejudice to Coleman's claims other than with respect to rights which could otherwise terminate with the passage of time). A. 31a-39a. Neither the effectiveness of the order assuming the leases nor the litigation on enforcement of the exercise of purchase options is stayed.

REASONS FOR DENYING THE WRIT

I.

PETITIONER HAS OVERSTATED THE ISSUE IN THIS CASE IN ORDER TO EXAGGERATE BOTH ITS IMPORTANCE AND ANY NEGATIVE EFFECT ON THE COMMERCIAL MARKETPLACE.

This case presents a limited question, partly of first impression under the Bankruptcy Code. There is no split among the circuit courts of appeal on interpretation of 11 U.S.C. § 365 as applied to this case. The question is not one as to any implied general authority of bankruptcy courts to abrogate existing contract rights.

The primary Bankruptcy Code question in this case is limited to whether the § 365 right to cure and the extension of the time to cure defaults by extending the time in which to assume or reject leases without objection by the landlord, preclude that landlord from relying on alleged prepetition defaults to enforce a contractual provision under which the landlord might, in the absence of bankruptcy, avoid an extension of the terms of the leases by reason of such prepetition defaults, when timely notice of extension of lease terms is given postpetition, prior to confirmation of the plan of reorganization, and prior to assumption of the leases.

This case does not, as Coleman suggests, P. 16-17, raise the specter of bankruptcy courts across the nation throwing the commercial market place into paralyzing uncertainty because any contractual provision could be set aside to effectuate the bankruptcy courts' views of the purpose of the Bankruptcy Code. The Ninth Circuit's summarizing sentence which does not by itself explain restrictions on the modification in bankruptcy of alleged contractual rights does not justify Petitioner's hysteria about the marketplace. In fact, the sentence at which Coleman takes offense *does* include language limiting the holding to extension of leases under terms applicable to "the Debtors here". The Ninth Circuit opinion cannot legitimately be read to authorize bankruptcy courts to make unbridled modifications of contract rights based solely on the belief that such modifications would further reorganization.

At least with the adoption of the Bankruptcy Code and its provisions modifying contract rights, including the right to assume or reject, to cure defaults, and the authority of the court to extend the time in which to assume and cure defaults, it cannot be said in this context (*cf.* P. 17), that "the highest public policy is found in the enforcement of the contract which was actually made." *Santa Fe, Prescott, and Phoenix Railway Co. v. Grant Bros. Construction Co.*, 228 U.S. 177, 188-89 (1913). Coleman has ignored important qualifying language in the same sentence. The Court had found in *Santa Fe, Prescott*, under the facts of that transportation fire loss case, that

> [t]here is no rule of public policy which denies effect to [the parties'] expressed intention [in that case], but, on the contrary, as the matter lies within the range of permissible agreement, the highest public policy [in that case] is found in the enforcement of the contract which was actually made.

Id. The part of the sentence quoted by Coleman has no application here, where the Bankruptcy Code *does* embody

policy contrary to the alleged contractual intention and creates rights in the debtors-in-possession in contravention of Coleman's interpretation of the contract provisions.

The facts of this case are not those on which the Supreme Court would best review the issue. It is by no means clear that Coleman could avoid the extension of the terms of the leases under the contractual provisions in question or under state law, even in the absence of a bankruptcy.

There is no genuine issue of fact as to the absence of pre-1992 notice of defaults by Coleman to the lessees sufficient to trigger the cure periods under the leases. New Hampshire law requires that defaults be noticed with specificity if the landlord seeks to terminate the tenancy. *See* N.H. Rev. Stat. Ann. §§ 540:1-a(I), 540:2(I), 540:3(III), and 540:28 (1992 Cum. Supp.) There is no genuine issue of fact as to the *de minimis* nature, under the circumstances, of the payment defaults Coleman wishes to rely on.[2] There is no genuine issue whether Coleman will receive the benefit of its bargain as a result of the assumption of the leases. Accordingly, even under general principles of equity and common law the leasehold estates would not be forfeited by reason of such defaults. Both state law and federal bankruptcy law abhor forfeiture. *Finn v. Meighan*, 325

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2. Only as to the Kittery, Maine store might there at first blush appear to be an issue under the summary judgment motion whether the alleged default is *de minimis*. (Even that issue would arise only if evidence of sufficient notice of the default had been presented to the bankruptcy court in opposition to the summary judgment motion. It was not.) The alleged default at Kittery is a non-monetary maintenance default, which, not being a payment default, has no contractual cross-default effect upon the other leases. If that alleged prepetition non-monetary default were a basis to prevent extension of the lease term under the contractual language, it would appear to be a penalty provision which is not countenanced by § 365(b)(2)(D).

U.S. 300, 301 (1945); *Fletcher v. Frisbee*, 404 A.2d 1106, 1109 (N.H. 1979); *C Co. v. City of Westbrook*, 269 A.2d 307, 309 (Me. 1970).

Although as a result of the passage of time and events subsequent to the summary judgment, Coleman has received (or will receive upon enforcement of the current lessees' exercise of the purchase options) the full economic benefit of its bargain. The property tax claims (all of which were prepetition) have been paid in full pursuant to the plan of reorganization. Coleman has no exposure to liability for any unpaid portion of the maintenance and environmental work charges. Coleman has already received the rents provided in the leases for the entire extended terms of the leases. Upon enforcement of the exercise of the purchase options, Coleman will receive the full consideration for which it agreed to sell the properties. It will have received the full benefit of its bargain.

Under these facts, and when the issue is properly limited to this case, the primary question is one of ordinary statutory interpretation of Bankruptcy Code provisions which have been in place for some time. There is no reasonable fear of any broad negative effect in the commercial marketplace. The secondary question on affirmance of the summary judgment even if the Ninth Circuit had erred in interpreting the Bankruptcy Code, is an ordinary summary judgment question. There is no compelling reason for the Supreme Court to consider the questions raised by the petition for writ of certiorari.

II.

THE COURTS BELOW HAVE FOLLOWED STANDARD PRINCIPLES OF STATUTORY CONSTRUCTION AND HAVE CORRECTLY INTERPRETED § 365.

A. The courts below correctly construed the right to cure in the context of the Bankruptcy Code as a whole.

Section 365(a) and (b)(1)(A) together provide a right to cure defaults upon assumption of a lease, regardless of any absence of a contractual or state law right to do so. The time frame in which to cure defaults pursuant to that right is governed by § 365(d)(4) and any orders pursuant to that subsection extending the time to do so.[3] The result of assumption and cure of defaults pursuant to the Bankruptcy Code is to reinstate the lease as of the bankruptcy petition date, as if no default had occurred. *In re Sigel & Co. Ltd.*, 923 F.2d 142, 145 (9th Cir. 1991); *In re RB Furniture, Inc.*, 141 B.R. 706, 710-11 (Bankr. C.D. Calif. 1992). Where, as here, there are prepetition defaults invoking the right to cure and the contractual time to exercise a right to extend the term of the lease comes before the Bankruptcy Code authorized time to cure (extended without objection), the provisions of § 365(d)(4) take precedence. The courts below have properly looked to the Bankruptcy Code as a whole to confirm the apparent Congressional intent of § 365. *See Sullivan v. Everhart*, 494 U.S. 83, 89 (1990) (statute to be construed as a whole).

Congress has neither required nor permitted the cure of prepetition defaults prior to assumption of the lease. *See* 11

3. The time to cure is further extended by § 365(b)(1)(A) which allows cure to follow assumption in the event of adequate assurance of prompt cure. In this case, cure of any remaining defaults did not follow promptly upon the assumption only because Coleman did not file the required statement of defaults, P.A. 6a, until August 22, 1997. A. 37a. The cure issues are set for a hearing on February 13, 1998.

U.S.C. § 365(b)(1)(A) and (d)(4). Prior to assumption of a lease and confirmation of a plan of reorganization, a landlord's claims for prepetition defaults cannot be treated differently from other unsecured claims. *See* 11 U.S.C. § 1122 on classification of similar claims; 11 U.S.C. § 1123(a)(4) on providing the same treatment to all claims of each class; 11 U.S.C. § 507 providing for some priorities (but none for the landlord's prepetition claims). In the event of rejection of the lease, the landlord has a prepetition unsecured claim. 11 U.S.C. § 365(g)(1); *see, e.g. In re Pacific Express, Inc.*, 780 F.2d 1482, 1486, n.3 (9th Cir. 1986). The Bankruptcy Code provides no authority for a Chapter 11 debtor to pay prepetition claims prior to assumption of the lease or confirmation of a plan, but does include authority for court orders extending the time to assume or reject (and therefore to cure defaults).

Congressional purpose to hold prepetition claims in abeyance (until confirmation of a plan for their payment, assumption of a lease or executory contract, or grounds for modification of the automatic stay) is also evident in 11 U.S.C. § 362 staying action against the debtor or its property by reason of prepetition claims. Indeed, any postpetition notice of prepetition defaults (such as the Supplemental Affidavit) would itself be a violation of § 362, if such notice had the effect of precluding extension of the lease terms and were thus an act against the leasehold property of the bankruptcy estate. None of the cases cited at P. 11 as to the lack of effect of the automatic stay to prevent termination of a contract by its own terms concern the effect of the automatic stay on alleged prepetition defaults such as those on which Coleman seeks to avoid the timely exercise of the right to extend.

A lease provision which would require postpetition, pre-assumption, pre-confirmation payment of prepetition amounts due in order to avoid a forfeiture of the leasehold interest, as

argued by Coleman, would operate as an *ipso facto* clause in violation of the intent of 11 U.S.C. §§ 363(*l*) and 365(b)(2)(A) and (B). The Court should not countenance Coleman's unnecessary interpretation of the statute which would frustrate the priority scheme of the Code and Congressional purpose of avoiding forfeiture or termination of property interests by reason of the filing of the bankruptcy petition.

None of this requires treating private contract rights lightly. During the postpetition extended terms of the leases Coleman received, before and after extension of the leases, all postpetition rent and other obligations accruing postpetition. The Ninth Circuit's interpretation of § 365 in this case does nothing to prevent the landlord's receiving the full benefit of its bargain. *See* subpart E below.

Coleman's interpretation, however, would require treating the bankruptcy court's § 365(d)(4) authority to extend time to cure as illusory in this context. Respondents submit that Congress cannot have intended to grant illusory authority. Indeed, Congress specifically provided for bankruptcy court power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). There is no exception to that § 105 authorization which would limit the bankruptcy court's authority to carry out § 365(d)(4).

B. Coleman misapplies the principle: *expressio unius est exclusio alterum.*

Coleman purports that Congress' specific invalidation of *ipso facto* clauses, authorization of rejection of an entire executory contract, imposition of the automatic stay, and creation of the right to cure defaults in connection with assumption, render any other modifications to contracts

impermissible (under the maxim of "the expression of one thing is the exclusion of another"). P. 8-10.

Here, however, the right to cure defaults is at the heart of the dispute. Debtor's right to cure defaults upon assumption is granted by 11 U.S.C. § 365(a) and (b)(1) and defined in part as to timing by 11 U.S.C. § 365(d)(4). Congress' not explicitly describing all the situations which the extension of time to cure could affect does not somehow make the one situation at issue here a different kind of thing from the right to cure. It is merely an instance of the application of the right to cure within the time provided by the Bankruptcy Code.

Further, assumption of an executory contract (including the required cure of defaults) "repeal[s] the contractual consequences [of the default]." *Sigel & Co. Ltd.*, 923 F.2d at 145 (citing *In re Taddeo*, 685 F.2d 24, 27 (2d Cir. 1982)). Assumption of a lease reinstates the provisions of the lease "as of the petition date." *RB Furniture, Inc.*, 141 B.R. at 710-711. The Bankruptcy Code grants a right to assume leases and cure prepetition defaults, thereby nullifying any contractual consequences of those defaults. This right and the right to make the assumption decision within the time permitted by the Code would be meaningless in this situation if Coleman's interpretation of the statute were correct. *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("The cardinal principle of statutory construction is to save and not to destroy," citing *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937)).

Unlike the instances cited by Coleman for limitation of the right to assume and cure by the maxim of *expressio unius est exclusio alterius* (P. 10), the Bankruptcy Code specifically provides:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

11 U.S.C. § 105(a). The authority granted by § 105(a) is very broad. *See United States v. Energy Resources Co.*, 495 U.S. 545, 549 (1990). "[B]ankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships." *Id.* Moreover, because § 105(b) contains a single exception to the authority of § 105(a), were one to follow Coleman's method of applying the maxim, there could be no exception to the authority of a bankruptcy court to issue an order to carry out the provisions of § 365(a), (b)(1) and (d)(4), other than the prohibition of the appointment of a receiver. (The expression of a single exception would preclude the existence of other exceptions.)

C. Coleman's misapplies the general principle that the leases must be assumed with their burdens intact.

Coleman's use of the general principle "that a debtor cannot elect certain terms it desires to assume and reject others", P. 12, is beside the point. The Bankruptcy Code question here is whether there is an exception to that generalization created by § 365. Some exceptions to that generalization are explicitly stated in the Code, § 365(b)(2). There are also exceptions necessarily implied by the Code, *e.g.*, delay in performance of prepetition obligations until assumption of the contract or confirmation of a plan calling for their payment. Citing the general principle for Coleman's implicit proposition that there are no exceptions is futile.

The more accurately stated principle is that *material* obligations owing to the non-debtor contracting party may not be excised by the debtor or the bankruptcy court without consent

(or failure to object to extension under § 365(d)(4)). *See City of Covington v. Covington Landing Limited Partnership*, 71 F.3d 1221, 1226 (6th Cir. 1995). This does not preclude their modification by Congress. It does not preclude the effect of § 365 on a provision Coleman now claims is material where the effect results from a Code-authorized extension of time which Coleman apparently deemed immaterial enough not to bother to object.

The general principle also has no application where the alleged obligations are prepetition claims which are to be paid in connection with assumption. In the bankruptcy context, any right to payment of prepetition unsecured claims *at a particular time* is not a "material" right of contracting parties. The delay of such payment is common to all such creditors. Coleman's argument on *cum onere* assumption simply begs the question whether Congress has provided a right to cure and a mechanism for establishing the time in which to do so which overrides contracts which might lead to a contrary result.

D. Coleman has misread the plain language of § 365(d)(3).

Coleman relies, P. 13-16, somewhat ironically[4], upon the statement of the "plain meaning" rule in *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989). That "plain meaning" rule, properly applied to § 365(a) and (b)(1), leads to the result reached by the Ninth Circuit. Section 365(d)(3) is irrelevant to that result. Coleman tries to make it relevant by sleight-of-hand.

Coleman emphasizes one phrase of the statute (*i.e.*, ". . . trustee shall timely perform all obligations of the debtor . . .",

4. The irony is that Justice White joined in the opinion of this Court in *Ron Pair* and in the Ninth Circuit majority opinion criticized by Coleman.

P. 14, while ignoring another critical phrase of the same provision: ". . . *arising from and after* the order for relief . . .". *See* 11 U.S.C. § 365(d)(3) (emphasis added). The consideration of only one phrase of the statute in isolation from the remainder as suggested by Coleman has no place in the jurisprudence of statutory construction. *Sullivan v. Everhart*, 494 U.S. 83, 89 (1990).

The plain meaning of § 365(d)(3) is that, prior to assumption or rejection, debtor lessees must pay landlords all lease obligations arising postpetition (except those set out in § 365(b)(2)). Any obligation which arose before the filing of the bankruptcy petition is not subject to § 365(d)(3). *See, e.g., Paul Harris Stores v. Mabel L. Salter Realty Trust*, 148 B.R. 307, 313 (S.D. Ind. 1992) (courts award lessors "post-petition, pre-rejection rent").

Coleman's clever but inappropriate sleight-of-hand occurs, when it exchanges Congress' term "obligations" for Coleman's own term "post-petition conditions for extending the lease term". P. 15. Coleman wants to use § 365(d)(3) to convert prepetition defaults into postpetition ones, and then suggest that Debtors' failure to pay the prepetition defaults prior to obtaining any authority to do so violated the § 365(d)(3) requirement of paying postpetition lease obligations as administrative expenses. P. 14.

However, the language of the leases conditioning extension of their terms on the absence of certain defaults is not an "obligation" which "ar[o]se from and after the order for relief". There has been no dispute that (with the exception of a *de minimis* alleged postpetition default) all of the claimed defaults are prepetition claims. There is nothing in the language of the statute to suggest that it permits or requires such a transformation of prepetition default into postpetition defaults, nor has *any* court applied such an interpretation. Moreover, nothing in the

limited legislative history for § 365(d)(3) supports Coleman's position.

The courts are in agreement that § 365(d)(3) acts to *equalize* the position of landlords with other creditors who provide service postpetition, not to create superpriority claims for the landlord, particularly as to prepetition claims. *In re Handy Andy Home Improvement Centers, Inc.*, 196 B.R. 87, 95 (Bankr. N.D. Ill 1996); *In re Ernst Home Center, Inc*, 209 B.R. 955, 964 (Bankr. W.D. Wash. 1997) (provision "does not accord landlords a windfall by paying a prepetition portion of their claim ahead of other unsecured prepetition creditors"); *In re Amber's Stores, Inc.*, 193 B.R. 819, 824 (Bankr. N.D. Tex. 1996) ("lessor has an administrative expense claim for unpaid *postpetition* lease obligations . . ." (emphasis added)).

> The general rule is that all administrative expense creditors must be treated with absolute equality unless a creditor agrees to subordinate its claims or unless the Code specifically provides otherwise.

In re MS Freight Distribution, Inc., 172 B.R. 976, 980 (Bankr. W.D. Wash. 1994), *citing In re Cochise College Park, Inc.*, 703 F.2d 1339, 1356 (9th Cir. 1983). "Where Congress has intended to alter the priority scheme established under Section 507, it has done so explicitly". *Id.*; *see also*, *Handy Andy Home Improvement Centers*, 196 B.R. at 95. As explained in detail by the court in *Handy Andy Home Improvement Centers*:

> Landlords are a uniquely situated class of creditors. A landlord, obligated under a pre-petition lease until rejection or assumption, is forced to continue its relationship with the debtor until the lease is rejected or assumed. * * * Congress, via § 365(d)(3), has sought to *equalize* their position. Section 365(d)(3)

> requires timely payment for current services so as to put the landlord into the position of a post-petition supplier who demands a cash payment. However, just as a supplier cannot coerce payment of the pre-petition claim, so too the landlord is placed into the position of receiving timely payment *only for current obligations. To imply more is to go beyond the plain language of the 1984 Amendments.*

196 B.R. at 95 (emphasis added).

Resort to the legislative history is typically not suitable in "plain meaning" analysis. *See Ron Pair*, 489 U.S. at 241. Coleman, however, refers to the history, P. 14-15, but overlooks Senator Hatch's statement of purpose for § 365(d)(3). Put in better context, the Senator set forth the existing problem the statute sought to remedy as follows:

> . . . during the time the debtor has vacated space but has not yet decided whether to assume or reject the lease, [under the pre-1984 Amendments law] the trustee has stopped making payments due under the lease. * * * In this situation, the landlord is forced to provide *current services* — the use of its property, utilities, security and other services — without *current payment*. No other creditor is put in this position.

H.R. Rep. No. 882, 95th Cong., 2d Sess. 1984, reprinted in *1984 U.S. Code Cong. & Admin. News* 576 (emphasis added). The clear purpose behind § 365(d)(3) was to provide landlords during the pre-assumption/rejection period with the same right to compensation afforded other postpetition creditors:

> Congress sought only to ensure that landlords received "current payment" for "current services"

> provided. * * * Congress enacted § 365(d)(3) to guarantee that landlords would not be placed at a disadvantage for providing post-petition services to the debtor. Put another way, Congress intended to put landlords on an equal footing, not to grant them a windfall at the expense of other creditors.

In re Best Products, Inc., 206 B.R. 404, 407 (Bankr. E.D. Va. 1997). No court has published a finding of legislative intent which conflicts with that found in *Best Products*. Congress did not intend to provide an otherwise unstated superpriority as to prepetition claims of certain landlords as a result of conditional extension provisions in a lease.

Finally, Coleman's illustration at P. 16 is inapposite. This is not a case of failure to give timely notice of exercise of a renewal option. The decision in *In re Crabb*, 48 B.R. 165 (Bankr. D. Mass. 1985) was based on the expiration prior to notice of both the time to give notice and the time to assume or reject, not on the prepetition defaults. There were also postpetition rent defaults. *Id.* at 166-68. If notice of extension were not timely and the lessee were in long standing rent payment default as in *Crabb,* the landlord could reasonably assume and rely upon the assumption that once the time to give notice had passed the lease was terminated. In this case, Coleman was given timely notice of renewal and continued to receive postpetition rents. Coleman could make no reasonable assumption inconsistent with the Debtors' intention to continue the leases pending their assumption or rejection. There has been no postpetition failure on the part of Debtors which violates § 365(d)(3). Coleman's argument must fail under the "plain meaning" rule and its argument finds no support in the legislative history of § 365(d)(3).

E. Coleman has received (or will receive upon its compliance with the exercise of the purchase options) the full benefit of its bargain as made in the leases it freely entered into.

Coleman has no legitimate complaint about losing the benefit of its bargain. As noted above, the prepetition property tax claims have been paid in full pursuant to the plan of reorganization; Coleman has no exposure to liability for any unpaid portion of the maintenance and environmental work charges; Coleman has already received the rents provided in the leases for the entire extended terms of the leases. Upon enforcement of the exercise of the purchase options, Coleman will receive the full consideration for which it agreed to sell the properties. At that point, having no further interest in the properties, Coleman has no interest in their value or condition. It will have received the full benefit of its bargain.

The only complaint Coleman will have is that it was not permitted to enforce a forfeiture of the leasehold interest after 1992 (for which extended term Coleman has already been paid all required rent) by reason of alleged prepetition defaults in order to cause a forfeiture of the purchase options and avoid the burdens of its bargain. Even outside of bankruptcy, Coleman would not, on the record presented on the summary judgment motion, have been permitted to enforce such forfeitures.

In any event, cases involving "benefit of the bargain" and § 365, focus on curing of defaults. A cure:

> effect[s] a total healing of the scars of contractual default, by placing the parties into the same position they were in immediately before the default occurred. This healing is accomplished *by paying the creditor whatever monies he would have received* under the contract had the debtor not defaulted. . . . [*The*

> *creditor] is thereby given the full benefit of the original bargain.*

In re Forest Hills Assoc., 40 B.R. 410, 415 (Bankr. S.D.N.Y. 1984) (emphasis added).

Coleman is not entitled to enforce a forfeiture based on prepetition defaults under the guise of its being part of the bargain when the curing of defaults will provide Coleman with the full economic benefit of its bargain. The only disruption of the bargain made by Coleman is the same delay in time which is shared by other creditors with respect to payment of prepetition unsecured debts. Coleman's argument that it is somehow entitled to more is meritless.

Further, a hearing on cure of any defaults is scheduled February 13, 1998. Coleman's argument that cure of defaults will not provide it with the full benefit of its bargain is at best premature. Finally, Coleman's reliance on the legislative history for § 365(e) regarding *ipso facto* clauses and the need to provide landlords the "full benefit of the bargain", P. 8, is misplaced. First, subsection (e) is not at issue. Second, as this Court has recognized in *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 379-80 (1988), generalizations such as "secured creditors should not be deprived the benefit of their bargain" are "inadequate to overcome . . . plain textual indication . . .". The plain indication of the Code is that Coleman may not enforce a forfeiture of the Debtors' interests in the leases by reason of prepetition defaults which Debtors have a right to cure upon assumption of the leases in the time permitted by § 365(d)(4) as extended (without any objection by Coleman).

F. The summary judgment should be upheld in whole or in part, even if the courts below erred as to § 365.

There is no genuine issue of fact with respect to insufficient prepetition notice of defaults to invoke the cure periods of the leases or to avoid anti-forfeiture provisions of state law. Except for the cross-default provision as to payment defaults only, there is no allegation of default under several of the leases. Such cross-default provisions are unenforceable in bankruptcy to prevent the assumption of individual leases. *See In re Braniff, Inc.*, 118 B.R. 819, 845 (Bankr. M.D. Fla. 1989); *In re Mr. Grocer, Inc.*, 77 B.R. 349, 354 (Bankr. D. N.H. 1987); *In re Sanshoe Worldwide Corp.*, 139 B.R. 585, 597 (S.D.N.Y. 1992), *aff'd*, 993 F.2d 300 (2d. Cir. 1993); *In re Sambo's Restaurants, Inc.*, 24 B.R. 755, 757-58 (Bankr. C.D. Cal. 1982).

If the Petition were granted and, in the unlikely event that this Court found the Ninth Circuit in error as to the interpretation of § 365 under which all these issues became immaterial, this Court should then review the summary judgment and affirm, nevertheless. Summary judgment may be affirmed "if any proper ground exists to support the [original] court's ruling." *Lindsey v. Dayton-Hudson Corp.*, 592 F.2d 1118, 1124 (10th Cir.), *cert. denied*, 444 U.S. 856 (1979).

CONCLUSION

Petitioner has submitted an overbroad statement of the issue and argued for misapplication of the "plain meaning" rule while purporting incorrectly that the Ninth Circuit failed to follow rules of statutory construction. There is no compelling reason to grant the Petition. For the reasons given above, the Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — TRANSCRIPT OF PROCEEDINGS DATED MARCH 17, 1995

THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

90-050S2-PHX-GBN
ADV. 91-00974

In Re.

CH. 11

THE CIRCLE K. CORPORATION COLEMAN OIL COMPANY, INC.,

vs.

THE CIRCLE K. CORPORATION

MOTION FOR SUMMARY JUDGMENT BY DEBTORS/DEFENDANTS

U.S. Bankruptcy Court
230 N. 1ST AVE., ROOM 5000
Phoenix, Arizona 85025

March 17, 1994
9:30 a.m.

BEFORE THE HONORABLE GEORGE B. NIELSEN, JR., Judge

APPEARANCES:

Appendix A

For the Debtor: James L. Rasmussen
James T. Reist
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PO Box 1276
Albuquerque, NM 87103

For Coleman Oil Co.: Carolyn J. Johnsen
HEBERT, SCHENK & JOHNSEN
1440 E. Missouri Ave., Suite 125
Phoenix, AZ 85014

THE CLERK: 90-05052, the Circle K Corporation; adversary 91-974, Coleman Oil v. the debtor; motion for summary judgment by debtors/defendants.

MS. JOHNSEN: Carolyn Johnsen on behalf of Coleman Oil Company. Your Honor, we've substituted in for Coleman from Jim Marlar and Melinda Barnett.

MR. REIST: Your Honor, James Reist for the debtors/defendants, and James Rasmussen.

THE COURT: Okay. Lady and gentlemen, I've reviewed the papers. I'm prepared to make a ruling on the defendant's motion for summary judgment at this time. Before I do so, however, I'll inquire if there's any — anyone wishes to add to their particular papers. Mr. Reist?

MR. REIST: Thank you, Your Honor. Your Honor, generally we believe we have replied sufficiently to Coleman's response to — enough to allow the Court to enter a summary judgment. However, yesterday afternoon we received a fax from Ms. Johnsen of a statute, which was not raised in the response,

but which she indicated Coleman was intending to raise today; a New Hampshire statute from Chapter 477, Section 15. And if Your Honor will allow, I'd like to respond to that particular statute very briefly.

THE COURT: All right. Perhaps what we should do, I'm not aware of the statute, so perhaps what we should do is invite Ms. Johnsen to tell us if she's inclined to utilize the statute as part of her argument here today. And it so, I'll attempt to resolve the matter. I'm not prepared on the statute, however, so I may have to take — either continue this hearing or take a matter under advisement, depending upon what the parties want to do. Ms. Johnsen?

MS. JOHNSEN: Your Honor, I don't think that the statute particularly changes our argument. It is an additional part of the statute of frauds argument. The statute indicates — or it talks about an oral conveyance, and I have a copy of the statute here. For the record, it states that every estate or land created or conveyed without an instrument in writing signed by the grantor or his attorney shall be deemed an estate at will only, and no estate or interest in land shall be assigned, granted or surrendered except by writing signed as aforesaid, or by operation of law. And I believe the statute just simply ties in directly to our statute of frauds argument, which is contained in our response. I'd be willing to hand this copy up to the Court. I've already provided it to opposing counsel.

THE COURT: All right. I'll take a bench copy of the statute. And although we've managed to reverse positions here, I will inquire if there's anything further you'd care to add on behalf of Coleman.

MS. JOHNSEN: Your Honor, I think the main thing that I

would add is in response to the reply that was filed last week by the debtors. And throughout their reply the debtors seem to indicate that it's Coleman's obligation to produce some kind of evidence that shows that there was not an assignment. And I think we're looking at this entire situation backwards.

The debtors are the movants here. And they need to indicate to you — this is a motion for summary judgment — that there are indeed no fact questions and that they can satisfy their burden, as a matter of law, that they are the lessees of these six leases. And I think that in our pleadings, we demonstrated that they just simply cannot satisfy that burden. There are too many factual questions in addition to questions of law that they cannot meet that burden.

I think — we've divided our arguments into essentially four separate sections. The first one is, I think, the one that demonstrates the numerous factual questions that exist. And I don't want to rehash my pleadings, but I would just point out a few things. The debtors seem to think that NEPD — and I hate to use all these initials, it gets rather confusing I understand — but NEPD, which claims to be one of the lessees, ended up with these leases by some sort of absorption process.

The fact of the matter is, there's nothing in the record that demonstrates how they became the lessees or the assignees of these leases. And in fact the evidence shows to the contrary. If you look at Mr. Welch's affidavit, which the debtors rely on, indicates that NEPD was exercising operational control. They never even admit, in the Welch affidavit and the letter that's attached to it from that particular attorney, that they were the lessee, or they were the assignee. They simply say NEPD was exercising operational control.

Appendix A

Later on, when NEPD attempts to exercise the option to renew the leases, NEPD attempts to exercise it with respect to all six, yet it's only claiming to be the assignee of four of the leases, whereas OCP, another entity, is claiming to be the assignee of two of the leases. That, in my mind, raises a huge factual question.

All right. Are they exercising operational control over all six leases, or only four leases? If that's the case, why did they try to exercise the option with respect to all of them? There's nothing in the record that shows that NEPD actually acquired the leases. Each and every document that the debtors have cited say NEPD was formed to hold assets. That's what the Welch affidavit says, hold assets including the four stores. We don't know how it was created. We don't know whether the leases were actually assigned. We don't have any of that — those documents. And it's their burden; not Coleman's burden. It's their burden.

I think one of the most telling things in the — in this entire file is the assignment, the retroactive assignment, which attempts to retroactively assign the leases to NEPD. And this occurs in 1992. And if you look at that document, it says that, in one of the recitals:

> "Whereas the assignor, Charter International Oil Company, represented that NEPD was the lessee, and whereas this assignment, this retroactive assignment, will now make that representation accurate."

Isn't that an indication that there wasn't an actual assignment that occurred? Isn't that an actual admission that there was no assignment?

These kinds of questions are raised in all of the pleadings. And what the debtor's answer to that is, "Well, it was our intent." Well, I don't think you can resolve intent of the parties on a motion for summary judgment. Now perhaps it can all come out in trial, but certainly not this stage of the pleadings.

The remainder of our argument on the statute of frauds and the statute that I've just given you, I think is pretty clear. The debtors seem to think that — all right, look Coleman, you had a provision in your lease that you didn't require any notice for an assignment of the lease. And so you didn't do that, and now you don't have any standing to raise the statute of frauds.

Well, I mean let's look at this from a practical standpoint. If the purpose of writings, when you're conveying interest in real estate, is to avoid fraud, then this is the exact situation that requires a writing. Not that there's fraud involved here, but supposing you were looking to someone to pay the rent and they didn't want to pay the rent, and they said, "Well, we assigned that lease to Joe over here." And what's the first question you're going to ask? "Where's the writing?" That's what you're going to say. And in order to convey that, that's why there is a statute of frauds, so that conveyances in real estate are not fraudulently done; so that somebody's not trying to escape obligations.

And here it's the same kind of situation. All we want to know, all Coleman wants to know is who are we dealing with. Is there an actual chain of assignment. And in this case, we've got — corporate mergers, we've got formations of new entities, we've got a situation at one point where Coleman writes a letter and says, "You know, by gosh, Circle K, if you're going to be — you know, we don't know who you are. We don't know

whether you're the actual lessee or an ssignee, but by gosh, you should assume these obligations under these leases." And there's no response. So it's sort of like they're hedging their bets.

NEPD only exercises operational control over the lease. That's what all the documents say. And Circle K never actually assumes the obligations under the lease. But now that we're in bankruptcy, Circle K wants to assume those leases and wants to say, yeah, we're actually an assignee. And I think there are some real problems there with statute of frauds.

The last two arguments, Your Honor, that we've raised are the expiration pre-petition. And I think this agument is just crystal clear with the retroactive assignment. They come up in 1992 and they say, "Look, we didn't think we actually assigned it when we said that we assigned it, so now in 1992 we're going to retroactively sign it and make all of those representations accurate." Well — and that assignment is going to be effective in 1988, a year after they would have had to exercise the first option. Coleman never, at any time, accepted them — accepted any of these new entities as a lessee; stated, you know, sure, we're not going to waive any of our rights, we're going to accept rent but we're not waiving any of our rights. We don't know who you people are.

And it seems to me that if you go through the machinations of doing a retroactive assignment in 1992, to make your previous representations accurate, then there wasn't an initial assignment. And in that case, those leases would have expired pre-petition, because the option, the exercise of the option, would not have been valid, because they were not the proper party to exercise that option.

Appendix A

And finally, Your Honor, we've also argued that even if somehow you can get to the point at the summary judgment stage that they were the actual lessees and the actual assignees of these leases, we think that the leases have expired post-petition. The argument there, and I — we've cited it in our brief, and I think the case is pretty telling; it's the *Revco* case.

And *Revco*, and in many other cases, talk about the fact that you can't just toss contract provisions out the window because you're in bankruptcy. And the only stumbling block we have reached in this particular case is that in order to exercise the option to renew, which came up post-bankruptcy, we've argued that the debtors had to actually cure before they were able to exercise their option. And that was because of the provision of the lease which requires timely notice of the exercise of the option, and it requires that the lessee not be in default.

And I think you have to look at that option provision as a separate provision, and as almost a stand-alone provision of the lease. It's a condition precedent. The lessee doesn't get to go on with the lease unless it satisfies those conditions precedent. The *Revco* case upholds that and says, well, you know, if you have a situation like that where there's an option to be exercised post-petition, and there are defaults which must be cured, then you're not permitted to just simply disregard those conditions precedent, so long as the lessor has taken some affirmative step — in that particular case it was a motion to require the assumption or rejection of the lease — but some affirmative step to demonstrate that you want the lessee or the debtor to assume or reject that lease; that you want them to go forward with a cure.

And in *Revco*, the court held that if that — if the creditor

files that kind of motion or takes that kind of step, then the letter of the contract, or the lease agreement, is to be read, you know — to be read to the letter. It's supposed to be interpreted exactly as it's written. And in this case, I think that we've got to get past the idea of just simple cure under 365 and look at the option as a separate provision.

If that's the case, this debtor failed to cure prior to exercising their option to renew. They were in default, which makes that option to renew invalid, and the leases expired then, post-petition. So if —

THE COURT: Ordinarily, of course, Ms. Johnsen, cure of pre-petition default on a lease of nonresidential real property doesn't have to occur until the debtor decides to assume the lease. And that's the practice of the code.

If your theory is correct, then any landlord — and landlords are the ones who typically draft leases. Any landlord could defeat that provision of federal law, could it not, by simply providing that if there's some desired options, the — to extend those options could not be exercised until there's a complete cure of any delinquencies. And then what would occur in bankruptcy would be that there would be a cure of the pre-petition debt of this particular creditor, even if later on the debtor decided not to assume the contract?

MS. JOHNSEN: I think that while it may seem a harsh result, in the instance where an option is contained within the lease, I think that requiring a cure before having—or before exercising that option is a viable result. Because I think you have to look at the option as a separate—almost a separate part of the contract. It is a separate part of the contract. It's a

condition precedent. And that makes it different from a standard contract in which the debtor is allowed to cure pre-petition default before assuming the lease.

And while it does require the debtor to go forward and cure at a time when perhaps the debtor has not made that decision to assume or reject, I think that the code didn't intend to toss out or eliminate contractual provisions. And what would happen is you'd be rewriting that contract. And you'd be saying, "Well, you know, I realize you have to satisfy the condition precedent, but you don't have to do that because you're in bankruptcy, so I'm going to rewrite that part of the lease and I'm going to give you an additional two years."

And that's what's happened here. Because you're rewriting that condition precedent and then giving them an initial — extra time. And I don't think that that's what was intended by Section 365. And that's why I think an option contract is different, and has been treated differently under the code.

THE COURT: Don't we often, in effect, rewrite leases when we allow, as an example, we allow a debtor to assume a lease and then immediately assign it to some other party? That's a, in effect, rewriting a — the lease, is it not, because a stranger then becomes a party to the lease.

MS. JOHNSEN: Well, I understand the Court's argument, but I don't think that being able to assign the lease actually rewrites the actual provisions of the lease. Yes, you have a new entity, but even in assigning the lease, the debtor is put to a pretty strict burden, under the code, of being — it — being able to satisfy business judgment and any other number of tests in being able to assign that lease. So there is some governing

provisions, but the actual itself is not rewritten. And in this case I think that's what would happen.

THE COURT: Understand. Counsel, anything to add to the movant's papers?

MR. REIST: Yes, Your Honor. Your Honor, we believe that we have provided uncontroverted evidence on each of the matters necessary for the debtors to show in order to obtain summary judgment. We don't believe that the opinions and conjectures of Coleman Oil Company are sufficient to make those statements in debtor's papers somehow suddenly controverted.

We want to make clear too, that NEPD — Coleman has attempted to lump all these entities together. NEPD was the assignee given in 1992 and 1990 — '87, 1987, of four of the stores. Old Colony Petroleum was the assignee with respect to two. There's a clear line of papers and through the liquidation papers and merger papers, and the actual lease assignment to OCP, to show that OCP is the assignee of those.

We feel in the case of NEPD, New England Petroleum Distributors, that those mergers, the plan of liquidation, and then the assignments between companies that were wholly owned by one another or were subsidiaries of the parent, where the leases were assigned in between those companies is clear.

We also take issue with a statement about the affidavit of Mr. Welch. Paragraph six of that affidavit says:

"NEPD came into possession of and became the

lessee assignee of the following stores prior to March 9, 1987,"

and the four NEPD stores are listed there.

Coleman makes a big issue about the retroactive assignments in 1992. And we submit that those are really only evidence of one thing. In 1991, when Coleman filed this adversary, they insisted that Circle K, or actually NEPD and OCP, produce written documents to prove the assignment. NEPD and OCP were not able to locate those written documents. Or I should say NEPD was not able to, for the final assignment to them. And this was an effort in 1992 to meet a concern that Coleman Oil Company had raised.

Additionally the — Coleman has indicated that the intent of the parties is not material here, but we've gone far beyond showing intent. We've shown actions on the part of NEPD, of OCP, and the parties who assigned them. NEPD and OCP are in possession of the stores. They have been paying rent on the stores. They've been acting as a lessee and as an assignee.

We also believe that our reply and motion and brief in support of the motion show that a third party is — who is not a party to the assignment or the contract cannot raise the statute of frauds. Coleman Oil Company could have made a written assignment a part of the lease, making a requirement within the lease. It chose not to, for whatever reason. And we do not think that they can come back now and say that an assignment, for which they were — with which they were not a party — to which they were not a party, is something that they can object to.

We think that the new statute raised today is nothing more than another statute of frauds provision that was indicated in the case of *Gowing v. Bell*, which is at 96 N.H. 361, in which that court, the Supreme Court of New Hampshire, recognized that provision as another statute of frauds provision. We believe our arguments at pages six and seven of our memorandum brief in support of defendant's motion clearly handle that problem.

Finally, a great deal is placed by the — by Coleman in the *Revco* case. We think that that case can be distinguished, Your Honor. In that case, the lessor was not seeking a declaratory judgment that the leases had terminated pre-petition, as is the case here. In that case the lessor was merely trying to expedite the decision of the debtor as to whether the debtor would assume or reject the lease. Believe that that's clearly a different situation and that Coleman's representation of how broadly *Revco* applies is simply not correct.

And finally, Your Honor, we also would submit that the code does not provide for a super priority created for the benefit of lessors in circumstances like this. And we do not believe that there is anything within the code that would suggest that that type of priority should be given to a lessor simply because it places an option in its lease. Thank you, Your Honor.

THE COURT: I'll make a ruling now concerning this matter. Anyone who wishes a complete copy of my ruling, my reasons therefor, may obtain it by contracting with the court technician, thereby obtaining a tape or a transcript of this hearing.

This is — this hearing has been oral argument on a motion for summary judgment filed by a defendant to an adversary

case. The adversary is number 91-974. The plaintiff is the Coleman Oil Company, Inc , which is a creditor in a Chapter 11 jointly administered bankruptcy case entitled the *Circle K Corporation*, that those debtors are listed as the defendants in the adversary proceeding.

The litigation itself reflected in the adversary proceeding deals largely with certain rental properties that are currently being operated in the northeastern portion of the United States. They're operated by the debtors, or by subsidiaries or successors of the debtor, as convenience stores. The ultimate decision here is, among other issues, is whether or not an assumption should be allowed of these executory commercial leases.

So the critical argument between the parties in this summary judgment motion relates to whether Circle K, or other entities — I'm going to follow counsel's practice, incidentally, by using initials here because of the large number of interlocking corporate bodies we have. The critical argument relates to whether Circle K, NEPD or OCP were formally assigned the leases. However, on the particular facts of this particular case, it doesn't appear to me, as a matter of law, that a formal assignment was required before a related entity would have the right to extend the lease. And here's why I think so.

It is true paragraph 11 gives the lessee the right to assign the lease, or any extensions, provided the lessee shall remain primarily liable. Now this provision in paragraph 11 does mean that absent a formal assignment from the lessee to another, that the subsequent entity would be unable to exercise the extension clause of the lease. For one reason, the — one reason for this conclusion is that's not what the paragraph says.

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The lease agreement itself specifically notes that the lease is binding upon the parties and their successors and assigns. See again, paragraph 11. The term lessee itself is specifically construed to include successors and assigns. See paragraph 21 of the lease. Paragraph 2(a) — strike that.

Paragraph 28(a) provides:

> "1) The word 'lessee' shall mean lessee and their respective successors and assigns."

And number two, it provides that as —

> "Except as provided otherwise, the agreement shall be binding upon the lessee and its successors and assigns."

So accordingly, it's clear by the express language of the lease document that an assignment, at the very least, was contemplated by the parties. However, a formal approval does not appear to have been required.

There is substantial evidence in this case that the entities NEPD, OCP and Circle K are the successors of the original lessee. Now the affidavit of Mr. Paul Welch, the president of NEPD since 1983, states that four stores came into NEPD's possession prior to March 9th of 1987. He states that on March 9th of 1987, NEPD informed plaintiff that NEPD was exercising its rights to extend the term of these four stores, as well as two others. And as a matter of fact, this latter point was conceded by Plaintiff Coleman in its earlier motion for summary judgment. See Statement of Facts Number 12 to that motion, which is document number 19 in the adversary file.

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Coleman states it was unaware of NEPD's status as an assignee of Pickering, and did not know nor question whether NEPD had authority to extend the leases. See the earlier statement of facts again, at statement 16. However, Coleman accepted payments on the six stores. Coleman later wrote a letter to Circle K and NEPD indicating it would accept payments without prejudice to question Circle K's status as an assignee.

Now it's clear that although the landlord chose not, in the lease, to make a particular issue or establish very rigorous requirements concerning assignments, the landlord is now quite concerned over the proprietary — the propriety of the assignments. Indeed in the litigation, and in its defense to summary judgment, Coleman's entire focus has been on the paper trail. That is, Coleman's concerned whether a formal assignment was executed prior two exercising an extension under the lease.

I believe this focus, as a matter of law, is unduly narrow, and is frankly unsupported by the lease that was negotiated between these parties or their predecessors. Since the lease would inure to the benefit of successors of the lessee, as well as to its assigns, as indicated, it's clear to me that the parties easily contemplated the possibility of an assignment. And as I indicated, the notice of the requirements imposed on the tenant in case of an assignment do not appear to be particularly burdensome. That indicates to me that the landlord was not particularly concerned.

I think as well that the statute of frauds defense is misplaced here. It's clear that Coleman is a stranger to the assignment. Coleman did not even require notice of assignment in the lease. The agreement allowed the right to assign the

lease upon such terms as the lessee should feel would be best. Again, see paragraph 11.

Third parties cannot assert the statute of frauds as a defense to an action by the direct parties to a contract. This is because the statute of frauds is a shield, not a sword. The statute is intended to prevent fraud by one of the contracting parties on the other. If those parties recognize the contract, the protection of the statute is unnecessary. The legal relations created by the contract, although maybe technically unenforceable, regardless, they can be given effect without violating the protection of the statute. See a — this principle is exhibited in a state case, *Chapman v. Ford*, 227 A.2d 26, at page 31.

Now plaintiff admits that NEPD and OCP submitted notices of the exercise of the first extension in 1987 within the time set by the agreement. Plaintiff admits it received notices of the second extension from NEPD and Old Colony Petroleum on March 5th of 1992 and March 31st of 1992. The deadline for giving notice was May 21st of 1992. The debtors argue the leases did not require Pickering, or its successors, to notify or obtain consent for any assignment of the lessee's interest, nor do the leases require the lessee to provide plaintiff with a proof of assignment. And plaintiff admits it has continued to accept payment from the debtors.

In addition, the debtors state the following facts are relevant in showing the chain of ownership. Number one, the stock of NEPD and OCP has been owned by NPI Corporation; number two, Circle K acquired 100 percent of the stock of NPI Corporation, and of NPI's interest in NEPD and OCP pursuant to a purchase agreement of May 6, 1988.

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The debtor notes that Pickering, Pickering Old Colony, Inc., Northeast Petroleum Corporation and P Corporation, NEPD and OCP were Massachusetts corporations. Under Massachusetts law, a successor corporation or surviving corporation of a merger or acquisition is vested with all right and interest in all of the property of the original corporation.

So in short, with respect to the Portsmouth and Durham stores, the chain of ownership of the lessee's interest is as follows: Pickering to Pickering Old Colony, Inc., to Northeast Petroleum Corporation, to Old Colony Petroleum Company. With respect to the Epping, Exeter, Kittery and Dover stores, the chain of ownership in the lessee's interest is as follows: Pickering to Pickering Old Colony, Inc., to Northeast Petroleum Corporation, to New England Petroleum Distributors, Inc.

In conclusion, I think the evidence that has been submitted by the movant here supports summary judgment to establish that the transfers and assignments alleged did take place. I think further that the debtor is correct in its analysis of Section 365.

The plaintiff has asked the Court to declare that the debtor's efforts to renew a five-year option must fail because the debtor had defaulted pre-and post-petition. I think the problem with this analysis is that for the debtor to merely exercise its rights to renew the lease, it is required by the contract to cure these defaults prior to actually moving to assume the leases.

Now the code requires the debtor to, number one, cure or provide adequate assurances that it will promptly cure such default, but this showing and this cure must occur at the time of assumption of the lease. Number two, the code requires a

debtor to timely perform post-petition obligations. What the code does not require is a debtor to cure pre-petition defaults prior to actually assuming the lease. I think this result not only makes sense, I believe it's supported by the case law.

A debtor may exercise its option to renew a lease without assuming the lease if the lessor has not required the court to order the debtor to assume or reject within a specified time. See 111 B.R. 626, at 629. In that case, since the lessor had not filed a motion to compel, the debtor was allowed to exercise its right to renew without assuming the lease and curing the pre-petition rent. See 111 B.R. at 630.

The court cited to an analysis from an earlier opinion, explaining that the right to cure defaults that may have given right to a — may have given rise to a right to termination arises under Section 365, and operates even though a grace period to cure defaults under the lease has expired. The reason is that the federal policy to allow the debtor time to decide whether it will cure a default outweighs state law contract provisions to the contrary. See the opinion at page 630.

If a lease is rejected, the rejection constitutes a breach of the lease. A provision is made for treatment of the lessor's claim pursuant to Section 365(g). If the plaintiff's position here would be upheld, then the priority scheme of the code would be skewed. That is, a debtor would be required to cure defaults in order to timely exercise an option, even if later on the debtor chose ultimately not to assume the leases.

So what the plaintiff essentially argues is that the debtor was required to prefer the plaintiff's claim as an unsecured creditor at the time it made its election to renew the lease, or would otherwise risk forfeiture of the leasehold. I think this

clearly violates the priority scheme of the code. It is only upon assumption that a default is cured. If a debtor does not assume, the existing default becomes part of an unsecured claim and is paid with no more priority than any other unsecured creditor enjoys under the code.

As to any existing defaults on any post-petition claims, the debtor notes that this amount would be under $200. In the plaintiff's earlier unsuccessful motion for summary judgment, the post-petition claim that was apparently in default was a Durham City water and sewer bill of $163.22. The debtors asserted that there is no evidence this matter was ever brought to the attention of OCP.

While at any rate, the facts are surely disputed on the issue of a post-petition default, but if the debtor was in default for this or some other post-petition bill, this would be an issue in regard to Section 365(d)(33) and would be a violation of my earlier order extending deadlines for assuming or rejecting leases. However, for reasons I'm going to disclose in a moment, I believe these small post-petition Debts, if they exist at all, are insufficient to cause a forfeiture of these leases.

First of all, as to either pre- or post-petition defaults, the lease does not provide that the lease will be automatically terminated if the lessee is in default on monthly payments at the time it elects to renew. Instead, the lease provides that the right to extend is conditioned upon lessee not being in default. So presumably then, under the lease, the tenant would be given an opportunity to cure this default as provided in the lease. Matter of fact, paragraph 15 outlines the cure provisions after a notice of default is received.

Second, even if I were to adopt the plaintiff's position that the debtor was required to cure all pre- and post- petition defaults as a condition to renewal, but prior — but — and require that cure to occur before actually moving to assume a lease, the— regardless, the next step would be to examine whether termination could have been reversed under a state anti-forfeiture provision or other state law. See the Ninth Circuit's decision in the *Waterkist Corporation* case, 775 F.2d 1089. There's a discussion at page 1091.

In that court, the Ninth Circuit examined whether a debtor could assume a lease that had terminated pre-petition. The court held the first inquiry was whether the lease was terminated under applicable state law prior to the bankruptcy. If so, the second inquiry was whether termination would have — could have been reversed under a state anti-forfeiture provision.

Now, I understand that the present issue here of monetary default does not necessarily involve an examination of whether the lease was terminated pre-petition. Regardless, I believe the *Waterkist* case is useful, because the two-part inquiry should be the same. That is, I would be required to examine whether the existing defaults resulted in termination at the time the debtor attempted to exercise its option to renew. If so, then I would need to inquire if termination would be reversed under a state anti-forfeiture provision.

The lease is silent as to which law to apply. However, the plaintiff is a New Hampshire corporation. And in one New Hampshire case the supreme court examined whether a tenant which ultimately filed an option to renew, nonetheless — strike that.

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In the — in one New Hampshire case, that state's supreme court examined whether a tenant, which untimely filed an option to renew, nonetheless effectively exercised the option. That's the *Fletcher* case, 404 A.2d 1106. The Court noted that courts avoid enforcing the forfeiture. See page 1109.

In *Fletcher*, the Court held although it was established that at the time — that time was of the essence in option agreements, equity would give them relief if the delay was slight, the delay had not prejudiced the landlord, and the failure to grant relief would result in such hardship to the tenant as to make enforcement unconscionable. In short, the Court felt it was required to balance the hurt. And I think a similar approach should be applied here.

I think the actual amount of the default would be de minimis. I don't believe there are any allegations that the monthly rent has not been paid, or that the lessor would suffer hardship if equity excused this particular default.

On the other hand, if a forfeiture is — would have been allowed here, the debtor would lose its lease on six stores, which pursuant to its business judgment, should be assumed. So clearly, the balance of financial harm would favor the avoidance of forfeiture because the debtor is required to cure any defaults anyway when it assumes the leases.

So as I look at all these issues, I do not believe there are any disputes of material fact. I'm going to grant the motion for summary judgment and I'm going to allow a — the debtor the opportunity to assume these leases subject to Section 365.

I'm going to direct the debtor's counsel to draft a short

order, or shorter than I have been, noting the granting of summary judgment. Serve a copy of the order on Ms. Johnsen, lodge the original with me for signature.

That completes this hearing. Be adjourned in this matter.

(Proceedings Concluded)

APPENDIX B — EXCERPTED LEASE PARAGRAPHS 3, 15 AND 19

* * *

3. The original term of this Lease shall be for a period of ten (10) years commencing on November 21, 1977.

Lessee shall have two (2) additional and successive terms of five (5) years each on the same terms and conditions as during the original term (except there shall be no extension rights beyond the two contained in this paragraph), by giving Lessor at least six (6) months' written notice of such extension prior to the expiration of the original or any extended term as the case may be, provided that Lessee's right to extend is conditioned upon the Lessee not being in default hereunder and is not in default of payments under any of the other leases described on Schedule C attached hereto.

* * *

15. (A) (l) If Lessee shall default in the payment of rent or other payments required of Lessee, and if Lessee shall fail to cure said default within fourteen (14) days after receipt of notice of said default from Lessor, or (2) if Lessee shall default in the performance or observance of any other agreement or condition on its part to be performed or observed and if Lessee shall fail to cure said default within thirty (30) days after receipt of notice of said default from Lessor, or if the nature of the default is such that it cannot be reasonably cured within said thirty (30) day period, if Lessee shall fail within said thirty (30) day period to commence to cure such default or shall fail to cure such default with due diligence within a reasonable period of time, or (3) if any person shall take this leasehold interest or any part thereof upon execution, attachment or other process of law, or

(4) if Lessee shall make an assignment of its property for the benefit of creditors, or (5) if Leasee shall be declared bankrupt or insolvent according to law, or (6) if any bankruptcy or insolvency proceedings shall be commenced by or against Leasee and, in the case of proceedings commenced against Lessee, not discharged within sixty days, or (7) if a receiver, trustee or assignee shall be appointed for the whole or any part of Leasee's property, or (8) there shall be a default of any payments under any of the leases referred to on Schedule C which are not cured within the applicable grace periods therein provided for, then in any of said cases, Lessor lawfully may immediately, or at any time thereafter, and without any further notice or demand, enter into and upon the Premises or any part thereof in the name of the whole, by force or otherwise, and hold the Premises as if this Lease had not been made, and expel Lessee and those claiming under it and remove its or their property (forcibly, if necessary) without being taken or deemed to be guilty of any manner of trespass (or Lessor may send written notice to Lessee of the termination of the term of this Lease), and upon entry as aforesaid (or in the event that Lessor shall send to Lessee notice of termination as above provided, on the fifth (5th) day next following the date of the sending of the notice), the term of this Lease shall terminate. Notwithstanding the preceding provisions of clauses (4), (5), (6) and (7) of this paragraph 15(A), if any of the events described in said clauses (4), (5), (6) and (7) occur, but any such events have not occurred with respect to any guarantor of Lessee's obligations hereunder, then Lessor may not terminate this Lease unless there is a default under some other provision of this Lease.

(B) In case of any such termination, Lessee will indemnify Lessor each month against all loss of rent and all obligations which Lessor may incur by reason of any such termination

between the time of termination and the expiration of the term of the Lease; or at the election of Lessor, exercised at the time of the termination or at any time thereafter, Lessee will indemnify Lessor each month until the exercise of the election against all loss of rent and other obligations which Lessor may incur by reason of such termination during the period between the time of the termination and the exercise of the election, and upon the exercise of the election Lessee will pay to Lessor as damages such amount as at the time of the exercise of the election represents the amount by which the rental value of the Premises for the period from the exercise of the election until the expiration of the term shall be less than the amount of rent and other payments provided herein to be paid by Lessee to Lessor during said period. It is understood and agreed that at the time of the termination or at any time thereafter Lessor may rent the Premises, and for a term which may expire after the expiration of the term of this lease, without releasing Lessee from any liability whatsoever, that Lessee shall be liable for any expenses incurred by Lessor in connection with obtaining possession of the Premises, with removing from the Premises property of Lessee and persons claiming under it (including warehouse charges), with putting the Premises into good condition for reletting, and with any reletting, including, but without limitation, reasonable attorneys' fees and brokers' fees, and that any monies collected from any reletting shall be applied first to the foregoing expenses and then to the payment of rent and all other payments due from Lessee to Lessor.

* * *

19. In consideration of the execution of this Lease and rentals to be paid hereunder, Lessor hereby gives Lessee, its successors and assigns, an option to purchase the Premises herein

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leased at any time after the original term has expired, but during any extended term of this Lease for the sum of $150,000.00 provided this Lease in full force and effect and Lessee shall not be in default hereunder and provided that the Lessee under any of the leases described in Schedule C is not in default of any payment thereunder.

If Lessee chooses to exercise its option to purchase the Premises, it shall do so by written notice to Lessor.

Said Premises are to be conveyed by a good and sufficient quitclaim deed running to the Lessee, or to the nominee designated by the Lessee by written notice to the Lessor at least seven (7) days before the deed is to be delivered as herein provided, and said deed shall convey good and clear record and marketable title thereto, free from encumbrances, except

(a) Provisions of existing buildings and zoning laws;

(b) Existing rights and obligations in party walls which are not the subject of written agreement;

(c Real estate taxes, water charges, sewer charges and similar impositions.

(d) Any liens for municipal betterments;

(e) The within Lease;

(f) All encumbrances existing at the time of the commencement of the term hereof other than mortgages;

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(g) Any encumbrances caused by or created with the consent *of* Lessee.

If Lessor shall be unable to give title or to make conveyance, or to deliver possession of the Premises, all as herein stipulated, then all obligations of the parties hereto to purchase and sell the Premises shall cease and shall be void and without recourse to the parties hereto, unless the Lessor elects to use reasonable efforts to remove any defects in title, or to deliver possession as provided herein, as the case may be, in which event the Lessor shall give written notice thereof to Lessee at or before the time for performance hereunder, and thereupon the time for performance hereof shall be extended for a period of thirty (30) days; If at the expiration of the extended time the Lessor shall have failed so to remove any defeats in title, or deliver possession, as the case may be, all as herein agreed, all obligations of all parties hereto to purchase and sell the Premises shall cease and this Agreement shall be void without recourse to the parties hereto.

The Lessee shall have the election, at either the original or any extended time for performance, to accept such title as the Lessor can deliver to the said Premises in their then condition and to pay therefor the purchase price without deduction, in which case the Lessor shall convey such title.

If the Premises shall be damaged or destroyed by fire or other cause between the time of the exercise of the option and the delivery of the deed, the Lessee shall nevertheless purchase the Premises, without deduction in price, but the insurance proceeds, if any, attributable thereto shall belong to Lessee.

If Lessee shall exercise its option to purchase the Premises,

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Lessor shall be obligated to discharge any mortgage placed on the Premises by Lessor and the Lessor shall have the right to use the purchase price to pay or discharge any such mortgage.

The acceptance of a deed by the Lessee or his nominee as the case may be, shall be deemed to be a full performance and discharge of every agreement and obligation herein contained or expressed, except such as are, by the terms hereof, to be performed after the delivery of said deed.

Rent shall be adjusted as of the time of delivery of said deed.

The closing shall take place at the Registry of Deeds in which the deed is to be recorded unless the parties otherwise agree.

If Lessee exercises such option, Lessee will pay to Lessor at the time of conveyance of said premises the entire purchase price in cash or he certified check.

* * *

APPENDIX C — STIPULATED ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ARIZONA ENTERED SEPTEMBER 17, 1997

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

Chapter 11

Case Nos. 90-5052-PHX-GBN
to 90-5075-PHX-GBN

Adversary No. 91-974-GBN

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IN RE:

THE CIRCLE K CORPORATION, CIRCLE K CONVENIENCE STORES, INC., CIRCLE K MANAGEMENT COMPANY, LAR-LIN, INC., FIRST CIRCLE PROPERTIES, INC., UTOTEM, INC., UTOTEM MARKETS OF ARIZONA, INC., U TOTEM OF ALABAMA INC., U-TOTE'M OF COLORADO INC., U-TOTE'M OF MIAMI, INC., TIC TOC SYSTEMS, INC., MONTERRE PROPERTIES, INC., SHOP & GO, INC., CIRCLE K GENERAL, INC., CIRCLE K HAWAII, INC., COMBINED AVIATION CO., CHARTER MARKETING COMPANY, CHARTER MARKETING COMPANY (CONNECTICUT), MR. B'S OIL CO., INC., MR. B'S FOOD MART, INC., NPI CORPORATION, OLD COLONY PETROLEUM COMPANY, INC., NEW ENGLAND PETROLEUM DISTRIBUTORS, INC., and 44TH STREET & CAMELBACK LIMITED PARTNERSHIP

DEBTORS.

COLEMAN OIL COMPANY, INC., a New Hampshire corporation,

PLAINTIFF,

vs.

THE CIRCLE K CORPORATION, et al.

DEFENDANTS.

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JOINTLY ADMINISTERED

STIPULATED ORDER

THIS MATTER having come before the Court upon the Motion to Enforce Exercises of Purchase Options, or, in the Alternative, to Preserve Rights to Exercise Beyond Expiration of Lease Terms ("Motion to Enforce") filed on or about August 9, 1997, by The Circle K Corporation, Old Colony Petroleum Company ("OCP"), and New England Petroleum Distributors ("NEPD") (collectively, "Debtors") and upon the Motion to Stay Proceedings Pending Appeal ("Motion to Stay") filed on or about August 27, 1997, by Coleman Oil Company, Inc. ("Coleman Oil") and upon the stipulation of the parties, including Gibbs Oil Company Limited Partnership ("Gibbs Oil") and New England Petroleum Limited Partnership ("New England Petroleum") (collectively, "Debtors' Assignees"), stated herein,

IT IS FOUND, CONCLUDED AND ORDERED that:

1. Without prejudice to Coleman Oil's arguments on Appeal (defined below) or otherwise, Gibbs Oil is the assignee of the Debtors' interests in Circle K Store No. 2604 at 2975 Lafayette Road, Portsmouth, New Hampshire, more specifically described in Exhibit A herein, and Circle K Store No. 2605 at #7 Old Dover Road, Durham, New Hampshire, more specifically described in Exhibit B hereto.

2. Without prejudice to Coleman Oil's arguments on Appeal (defined below) or otherwise, New England Petroleum is the assignee of the Debtors' interests in Circle K Store No. 84802 at Rt. 16B/Old Rochester Road, Dover, New Hampshire,

more specifically described in Exhibit C hereto, and Circle K Store No. 84803 at Route 125, Epping, New Hampshire, more specifically described in Exhibit D hereto, and Circle K Store No. 84804 at 158 Front Street, Exeter, New Hampshire, more specifically described in Exhibit E hereto, and Circle K Store No. 84805 at Route 236, Kittery, Maine, more specifically described in Exhibit F hereto.

3. Further proceedings in this adversary proceeding are hereby stayed as of entry of this Order. This stay of proceedings herein shall continue until resolution of the appeal of this Court's Order entered April 6, 1994, now pending before the Ninth Circuit Court of Appeals ("Appeal"), except upon the application by any of the parties in this adversary proceeding to modify this stay for good cause. This is not a stay of the Order entered April 6, 1994, approving assumption of the leases. This stay does not affect the obligations of the parties to this stipulation to provide notices as required by law or as may be required by the terms of the leases which are the subject of this adversary proceeding. This stay does not affect the terms of the leases except to preserve rights, claims and arguments as they now stand beyond November 30, 1997, and to extend possessory rights, rights to cure defaults, if any, and rights to exercise or re-exercise purchase options (if such rights exist) beyond November 30, 1997, as provided herein.

4. Coleman Oil's responses to discovery already propounded by Debtors shall be due 30 days after determination of the Appeal, subject to further ruling on the Motion for Protective Order filed by Coleman Oil on or about August 27, 1997, 1997, as part of its Motion to Stay, or on any additional motion for protective order which may be filed by Coleman Oil after determination of the Appeal.

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5. By their stated terms, the leases expire November 30, 1997 (assuming they were properly extended as previously found by this Court, and without prejudice to Coleman Oil's arguments on Appeal). Debtors' Assignees shall, nevertheless, remain in possession of the premises beyond November 30, 1997, if the Appeal and "Subsequent Litigation" are not finally concluded prior to that date. The Subsequent Litigation referred to in the prior sentence includes litigation in this Court and any further appeals with respect to the issues in this adversary proceeding (including the consolidated motions to assume leases) and in the Motion to Enforce (without prejudice to Coleman Oil's arguments that this Court lacks jurisdiction over certain issues in the Motion to Enforce); it also includes litigation, if any, in other courts to enforce the exercise of re-exercise of the purchase options included in the leases. During this extended period of possession, Debtors' Assignees shall continue to pay monthly rents and abide by all other terms as provided in the leases with respect to the stated final term otherwise ending November 30, 1997.

6. The foregoing requirement that rents continue to be paid is without prejudice to the arguments of Debtors and/or Debtors' Assignees that, to the extent such "rents" (whether previously paid or paid in the future pursuant to the leases and/or this Stipulated Order) are for periods following a valid exercise of purchases option(s), such rents must be credited against the purchase option prices.

7. The extended period of possession described above shall continue through:

A. the end of the first full calendar month after the expiration of any appeal period without an appeal being filed

of any final determination that the leases were not properly extended and had already terminated prior to the July 1996 notices of exercise of purchase options, or the final disposition of any appeal of any such decision; or, in the absence of such a final decision not subject to appeal, upon:

B. the end of the first full calendar month after the expiration of any appeal period without an appeal being filed of any final determination of a court of competent jurisdiction on enforcement of exercises of purchase options, or the final disposition of each appeal of any such decision.

8. The parties to this Stipulated Order contemplate that proceedings to enforce the July 1996 or any other notices of exercises of purchase options will follow final determination of the Appeal.

9. Any applicable statute of limitations on enforcement of the leases or of the exercise of purchase options included therein shall be suspended during (a) the pendency of the stay of proceedings herein as provided by ¶ 3 above, and (b) until the later of: (i) the end of the calendar month which includes the 90th day after notice to the parties of the final disposition of any and all appeals (and subsequent proceedings on any remand) of this Court's ruling, if any following Appeal, on what cure of defaults is required, if any, with respect to the assumption of the leases; (ii) the end of the first full calendar month after any date set by this Court to complete any cure of defaults required with respect to the assumption of the leases, such date to be set also being extended by the time to reach final resolution of any appeals of the Court's order setting such date.

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10. If it is finally determined that the leases were properly extended and assumed, but that defaults existed which prevented valid exercise of purchase options in July 1996, then upon determination by this Court of such defaults to be cured, Debtors' Assignees shall be permitted to re-exercise the purchase options following cure of such defaults, without regard to any requirement of the leases that they be exercised during the extended term which expires November 30, 1997, as stated in the leases. This paragraph extends the time in which such purchase options can be exercised, if not already precluded by termination of the leases prior to November 30, 1997. However, this paragraph shall not be construed to waive or preclude Coleman Oil from maintaining (a) that defaults may have prevented or continue to prevent any exercise of any purchase options, (b) that this Court has no jurisdiction to determine issues with respect to validity of exercise of any purchase options, or (c) that any decision by this Court is not binding in subsequent litigation.

11. A certified copy of this Stipulated Order may be recorded in each County in New Hampshire and Maine where one of the properties is located. Such recorded certified copy shall suffice as notice to the world of the continuing possessory and possible purchase options rights of Debtors' Assignees, beyond the expiration of the final terms stated in the leases and any previously recorded memoranda of leases.

12. Upon termination of the continued period of possession provided by this Stipulated Order and/or upon any enforcement of exercises of the purchase options, Coleman Oil and Debtors Assignees shall sign recordable notices of termination of rights under this Stipulated Order.

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13. This Stipulated Order shall be binding upon the successors and assigns of Coleman Oil and of Debtors' Assignees.

14. The intent of this Stipulated Order is to preserve the rights, claims and arguments of the parties hereto as they now stand, with modifications only as to possession of the properties beyond November 30, 1997, and exercise of re-exercise of purchase options after that date, depending upon the result of the now pending Appeal and Subsequent Litigation. Any ambiguity or omission or incompleteness in this Stipulated Order, shall be interpreted or resolved to accomplish that end.

15. This Court retains jurisdiction to interpret and enforce this Stipulated Order and hereby continues, pending determination of the Appeal and further request for hearing by an interested party, any hearing on remaining issues in or with respect to the Motion to Enforce and Coleman Oil's Motion to Dismiss such motion, the Debtors' Objection to Statement of Defaults filed on or about August 22, 1997, and Coleman Oil's Motion for Protective Order.

DATED this 17th day of September, 1997.

s/ George Nielsen
United States Bankruptcy Judge

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So stipulated:

THE CIRCLE K CORPORATION
OLD COLONY PETROLEUM
NORTHEASE PETROLEUM DISTRIBUTORS, INC.,
collectively "Debtors"

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GIBBS OIL COMPANY LIMITED PARTNERSHIP
NEW ENGLAND PETROLEUM LIMITED
PARTNERSHIP f/k/a
CHELSEA PARTNERS LIMITED PARTNERSHIP,
assignees of Debtors' interest

Appendix C

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[Exhibits A-F are not reprinted]